BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2013040771
v.	ORDER GRANTING/DENYING MOTION TO QUASH
RIVERSIDE COUNTY OFFICE OF EDUCATION ET AL.	

On April 18, 2012, the Parent on behalf of Student (Student) filed a request for due process hearing. Following notices of insufficiency and motions to dismiss, the remaining respondent is the Riverside County Office of Education (COE). The two remaining issues pending are (A) whether COE is in procedural compliance of the Individuals with Disabilities Education Act (IDEA) and related state laws, and (B) whether COE has provided a free appropriate public education (FAPE) to Student. As a proposed resolution, Student seeks Independent Education Evaluations in a number of areas and compensatory education.

Student has been during all times material incarcerated at the Riverside County Juvenile Hall (RCJH). COE is the local education agency operating the juvenile court school for the RCJH.

On May 8, 2013, COE, by its counsel, caused to be served a subpoena duces tecum (SDT) on the Custodian of Records of the Riverside County Probation Department (RCPD).[1] The SDT requests that the Custodian produce records documenting these areas: (1) Student's history on Probation; (2) school data including attendance, behaviors, credits earned, and who is the current holder of educational rights); (3) Student's medical history; (4) Student's substance abuse history; (5) assessments and provision of educationally related services; (6) Student's mental health history; (7) Student's history prior to incarceration; (8) Probation Officer's Evaluation and Assessment Reports; and (9) "Any and all documents regarding Student's Juvenile Court history."

In his declaration in support of the SDT, COE's counsel, Jack B. Clarke, Jr., outlined the issues being litigated and concluded: "In this regard, one of the primary areas of challenge in this action relates to Student's behavioral, mental health, psychological, and academic needs, and whether Respondents offered a FAPE to the Student in light of these identified needs."

[1] RCPD operates the RCJH.

On June 4, 2013, Student filed a motion for an order quashing the SDT's. Student contends that the SDT's should be quashed for the following reasons: (1) discovery is not permitted in special education administrative matters; (2) the SDT is overly broad; (3) the SDT is not accompanied by a statement that the sought records are necessary; (4) the mere existence of assessments does not entitle COE to obtain access to these assessments; (5) Juvenile Court files may not be inspected by anyone without a court order except those permitted by statute; and (6) RCPD reports are not related to education and are not relevant.

On June 10, 2013, COE filed an opposition to the motion.

APPLICABLE LAW AS TO MOTION TO QUASH

Federal law provides for the rights to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) Both of those subsections relate only to due process hearings, not to any prehearing procedures. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) Both of those subsections relate only to due process hearings, not to any prehearing procedures.

Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed. Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. Section 56505, subdivision (a) provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Board of Education promulgated section 3082, subdivision (c)(2), of title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs.

The provisions of the Administrative Procedure Act governing subpoenas do not apply to special education hearings. (Cal. Code Regs., tit. 5, § 3089.) Subdivision (c)(2) of section 3082 of title 5 of the California Code of Regulations provides in pertinent part that in special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)."

Special education law does not specifically address motions to quash subpoenas or SDTs. In ruling on such motions, the Office of Administrative Hearings (OAH) relies by analogy on the relevant portions of the California Code of Civil Procedure. Section 1987.1 of that code provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

Section 3082, subsection (c)(2) of Title 5 of the California Code of Regulation (Section 3082) permits the issuance of SDTs "upon a showing of reasonable necessity by a party." This requirement mirrors that required by California Code of Civil Procedure section 1985, subdivision (b), which requires:

> A copy of an affidavit shall be served with a subpoena duces tecum . . ., showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The Code of Civil Procedure also requires a similar affidavit in an SDT. Section 1985 requires that an SDT shall be served with an affidavit demonstrating good cause in "full detail" how the material being sought is material to the issues involved. The requirement to demonstrate good cause as to materiality is not met by the affiant's legal conclusion. The good cause requirement is met by a factual showing of why the requested documents are material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.)

DISCUSSION

Student in his motion, seeks to quash the SDTs on grounds that (1) there is no discovery permitted in special education cases; (2) the SDT fails to provide documentation that the information is "reasonably necessary;" (3) the request is "overly broad;" and (4) the mere existence of other assessments does not entitle the COE to have access to such assessments; as these documents are not relevant to the issues.. Student's first grounds is without merit as the COE sought to have the custodian of records to produce the documents at the day the due process hearing was scheduled to commence pursuant to the OAH issued scheduling order dated April 18, 2013.

The affidavit of COE's counsel, Jack B. Clarke, Jr., is more than sufficient to meet the standards of Section 3082 as it demonstrates fully the materiality to the issues involved in the case and how the requested documents are relevant to the issues to be heard. Additionally, Student contends that the SDT is "overbroad." Student's argument is without merit as it is based on the COE counsel's affidavit not being sufficient.

Student's contends that any assessments which were prepared as part of the Juvenile Court case and never shared with the COE is not material or relevant to the due process issues.

Dated: June 14, 2013

/s/

ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings